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No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND
MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Petition in this case urged review by this Court for several interrelated reasons. *See* Pet. 10-30; *see also* United States Amicus Curiae Br., No. 04-1315, at 8-19. First of all, the Second Circuit, by invalidating a thirty-year-old Department of Labor regulation, 29 C.F.R. § 552.109(a), has put itself into direct conflict with the Tenth Circuit (which twice upheld the same regulation) and introduced needless uncertainty into the delivery of personal companionship services to the infirm and elderly. Moreover, the Second Circuit arrived at its decision by the highly questionable path of declaring that the regulation—which was promulgated under express grants of lawmaking authority and after notice and comment rulemaking—was just an interpretation without the "force of law" and consequently undeserving of deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467

U.S. 837 (1984). Finally, in denying any deference at all under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the court of appeals alternately ignored and misread the relevant statutory provisions and ultimately based its decision to invalidate Section 552.109(a) on an interpretation of another Department of Labor regulation, 29 C.F.R. § 552.3, that is squarely at odds with the Department's own interpretation of that regulation.

In her Brief in Opposition respondent takes issue with the Petition on a wide array of grounds, ranging from an insistence that there is no conflict between the Second and Tenth Circuits to a contention that an agency's resort to notice and comment rulemaking says little about its intention to promulgate binding rules of law. Respondent also asserts that, in any case, the decisions below are of no real importance. None of these arguments is substantial.

1. a. Although respondent claims that the decisions below are not in conflict with any Tenth Circuit decision (Br. in Opp. 1-4)—characterizing the rulings in the Tenth Circuit cases upholding Section 552.109(a) as "dicta" (Br. in Opp. 1-2)—that contention is off the mark. *See Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2000); *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004). In *Johnston*, the court of appeals specifically addressed, and expressly rejected, an argument that Section 552.109(a) "[did] not have the effect of law," 213 F.3d at 561, choosing instead to give it deference under *Chevron*. *Id.* at 562. In the plainest possible terms, the court then concluded: "*We hold* that the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption." *Id.* (emphasis added). Subsequently, in *Welding* (a case decided after *United States v. Mead Corp.*, 533 U.S. 218 (2001)), the Tenth Circuit observed: "*We have held* that the domestic service employee need not be employed directly by the person receiving the services or by the person's family for the exemption

to apply." 353 F.3d at 1217 n.3 (emphasis added), citing *Johnston*, 213 F.3d at 562.

Respondent nevertheless contends that the rulings are "dicta" because neither was essential to disposition of the case. Br. in Opp. 1-2. That is not correct under any concept of "dicta" with respect to *Welding*, which upheld the appeal of a third-party employer who could not have prevailed if Section 552.109(a) were invalid. *See* 353 F.3d at 1218-21. But, in any event, respondent appears to be defining "dicta" too broadly. In *Johnston*, the court of appeals did not make a detour into hypothetical issues, but instead rendered two independent holdings (one favorable to the employer, one not), treating each one as a necessary question to be resolved. Both rulings in *Johnston* thus became the law of the Circuit, as the later reference in *Welding* makes evident. *See generally Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1030 (7th Cir. 2004) ("[t]here is a big difference between dicta and alternative holdings").

As matters now stand, therefore, Section 552.109(a) is valid and enforceable in the Tenth Circuit, yet invalid and unenforceable in the Second Circuit. There is no good reason to allow that erratic pattern to persist. While respondent points out (Br. in Opp. 5-6) that some States have their own minimum wage and overtime laws—and thus that wages are not nationally uniform anyway—it is one thing for individual States to require higher compensation in accordance with local conditions, quite a different thing for one federal court, but not another, to order higher compensation as a matter of federal law. The Department of Labor has determined that third-party employees providing companionship services are exempt from federal wage and hour laws, and that rule should be controlling everywhere or not at all. Thanks to a clear-cut split in the Circuits, at present it is neither.

b. Respondent seeks to diminish the importance of the rulings below, asserting that their impact will be minimal. Br. in

Opp. 4-9. The briefs of amici curiae make clear why that is not so. By all accounts, third-party employers newly subject to the wage and hour laws simply cannot absorb the increased costs directly, especially the burden of time-and-a-half overtime obligations. *See* Continuing Care Leadership Coalition Am. Br. 6-7; New York State Assoc. of Health Care Providers Am. Br. 5. To stay in business, therefore, the employers will be left with one (or a mixture) of two choices: they can try to avoid paying the added costs by restructuring how care is provided to the infirm and elderly or they can attempt to pass the costs on to Medicare and Medicaid (or other potential payors). Neither choice is satisfactory. As the amicus briefs describe, any sharp reduction in overtime hours will necessarily disrupt the care received by needy clients, at serious potential cost to their well-being. *See* New York State Assoc. of Health Care Providers Am. Br. 7; Home Care Council Am. Br. 8-11; Continuing Care Leadership Coalition Am. Br. 9-11; City of New York State et al. Am. Br. 8-11; Home Care Assoc. of New York Am. Br. 15-18. As for shifting the costs, even if prompt reimbursement of the higher costs were available—which it is not, *see* National Ass'n for Home Care & Hospice, Inc. Am. Br. 7-9; New York State Assoc. of Health Care Providers Am. Br. 4—government treasuries are not an inexhaustible source of funds. *See* City of New York et al. Am. Br. 6-7. Indeed, in its earlier amicus brief, the United States expressed concern about the adverse effect of the initial Second Circuit decision on federal payments under Medicare and Medicaid, *see* U.S. Am. Br. No. 04-1315, at 16, a likely (if delayed) consequence that respondent seems to confirm. *See* Br. in Opp. 6 (home care "heavily subsidized by federal and state governments under Medicaid and other programs").

It was, in fact, just such concerns that led the Department of Labor to withdraw its proposal to eliminate Section 552.109(a) only four years ago. While respondent cites material from the notice of proposed rulemaking saying that

elimination of Section 552.109(a) would not be particularly costly, Br. in Opp. 7, she nowhere acknowledges that the Department revised its opinion after reviewing numerous critical comments, including those from other federal agencies. Thus, in its final notice, after referring to its former belief that "there would be little economic impact on affected entities if such workers were not exempt from FLSA's minimum wage and overtime pay requirements," 67 Fed. Reg. 16,668 (2002), the Department stated that "numerous commenters on the proposed rule, including multiple government agencies such as the Small Business Administration and the Department of Health and Human Services, seriously called into question the Department's conclusion that there would be little economic impact." *Id.* Nothing cited by respondent demonstrates that the economic impact would be any less disruptive now.[1]

2. With respect to *Chevron* deference, respondent bases her "no deference" argument almost entirely on the fact that Section 552.109(a) is contained in a subpart headed "Interpretations." Br. in Opp. 9-15. Insofar as respondent means to say that, as a matter of law, agency interpretations are never entitled to *Chevron* deference, that position is simply wrong. As we have previously observed, *see* Pet. 17, the two-part *Mead* test by its very terms, makes clear that *Chevron* deference may be granted when "the agency interpretation claiming deference was promulgated in the exercise of [delegated lawmaking] authority." *Mead*, 533 U.S. at 227. That does not mean, of course, that *all* agency interpretations are entitled to *Chevron* deference: the question is whether the

[1] Respondent says that New York Medicaid regulations limit personal care services to 28 hours a week "absent unusual circumstances." Br. in Opp. 8. But those "unusual circumstances" are, in fact, quite usual, including situations in which "assistance by informal caregivers is unavailable, withdrawn, reduced, or unacceptable to the patient." 18 NYCRR Section 505.14(a)(6)(ii)(b)(1)(iii). In such cases, patients can, and often do, receive up to continuous round-the-clock care.

particular interpretation was promulgated pursuant to a grant of lawmaking authority and, in fact, has the force of law. *See Mead*, 533 U.S. at 226-27.

We think that an agency decision to engage in notice and comment rulemaking pursuant to delegated lawmaking authority is, at the very least, strong evidence that the agency is making law. And that seems to be the consensus among federal courts of appeals: following *Mead*, various federal courts of appeals have routinely cited notice and comment procedures as a reason, or *the* reason, for according *Chevron* deference to an agency regulation. *See* Pet. 19-20 (citing cases). While respondent is right that those courts have not engaged in extensive analysis, that fact, far from undermining the importance of notice and comment rulemaking, simply illustrates how much weight the federal courts naturally give to agency use of that relatively formal process. In contrast, by treating notice and comment as essentially irrelevant to whether an agency regulation has the effect of law, *see* Pet. 20, the Second Circuit has wrongly declined to give proper respect to legitimate agency lawmaking.

Respondent relies on various cases giving only *Skidmore* deference to Department of Labor "interpretations." *See* Br. in Opp. 15. But not all Department of Labor "interpretations" are alike. For example, in the process of implementing the Section 213(a)(1) exemption for "bona fide executive, administrative, or professional" employees, 29 U.S.C. § 213(a)(1), the Department long ago issued a broad range of "interpretations" *without* undertaking the notice and comment process. *See* 14 Fed. Reg. 7730 (1949). It is unsurprising that such agency guidance would receive no more than *Skidmore* deference, as the cases cited by respondent demonstrate. However, where the Department *has* engaged in notice and comment rulemaking—as it did here and has done subsequently for at least one Section 213(a)(1) regulation (*see* discussion below)—a higher standard of judicial deference should be accorded.

The decision in *Auer v. Robbins*, 519 U.S. 452 (1997), reflects that difference. There, the Court upheld a Section 213(a)(1) regulation that was located in a subpart entitled "Interpretations." In his brief in *Auer*, the Solicitor General specifically called attention to that heading, observing: "Although the 'salary basis' test (29 C.F.R. 541.118) appears in the 'interpretations' subpart (Subpart B) of Part 541, rather than the 'general regulations' subpart (Subpart A), that placement does not affect the level of deference owed to the rule." United States Amicus Curiae Br., No. 95-897, at 16 n.4. The brief then went on to note that "Section 541.118 was promulgated pursuant to notice and comment rulemaking in accordance with the statutory authorization in Section 13(a)(1). *See* 19 Fed. Reg. 1321-1322 (1954)." *Id.* The Court accorded the regulation full *Chevron* deference. *See* 519 U.S. at 457.[2]

3. Respondent's discussion of *Skidmore* deference largely tracks the Second Circuit's discussion, Br. in Opp. 20-28, including the court of appeals' conspicuous slighting of the relevant statutory provisions. *See* Br. in Opp. 20-21 (11-line discussion of statutory language). Thus, while respondent refers to the "text" of the Act, she almost completely ignores the language of the coverage provisions in the 1974 Amendments, 29 U.S.C. §§ 206(f), 207(*l*), especially language setting forth the employees deemed to be "[e]mployees in domestic service" under Section 206(f). Those provisions, however, shed helpful light on the interpretation of the similar term "employee employed in domestic service employment"

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[2] Respondent says that *Auer* is inapposite because the regulation "was . . . entitled to heightened deference as the agency's construction of its own regulation," Br. in Opp. 15-16 n.18, but she is focusing on the wrong part of the *Auer* opinion. Although the Court later addressed the agency's interpretation (in an *amicus* brief) of its own regulation, *see* 519 U.S. at 461-63, the earlier part of the *Auer* opinion considered whether the regulation itself "reflects an unreasonable interpretation *of the statutory exemption*." 519 U.S. at 457 (emphasis added). Applying *Chevron* deference, the Court held that it did not. 519 U.S. at 457-58.

in Section 213(a)(15). *See* Pet. 25-27. And, while respondent advances at least one seemingly favorable tidbit of legislative history, Br. in Opp. 21, she makes no attempt to come to terms with other contrary legislative history indicating that the coverage provisions—subject, of course, to the specific exemptions in Section 213(a)(15)—were meant to have broad sweep. *See, e.g.*, H.R. Rep. No. 93-913, 93 Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2845 ("[i]t is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service").[3]

Respondent likewise fails to explain away the mysterious coverage gap that her interpretation of the Act would produce. As we explained in the Petition, Pet. 26, and as the Department noted in its Advisory Memorandum, Pet. App. 59a-60a, if the 1974 Amendments covered only domestic workers employed by the homeowner receiving care and not those employed by third parties, then domestic workers (cooks, maids, housekeepers, etc.) employed by agencies too small to be covered by the "enterprise" provisions would not be covered at all. The only solution offered by respondent to this troubling textual problem is a wholly result-oriented suggestion that federal courts could treat the term "employees in domestic service" expansively for purposes of determining coverage under Section 206(f), but then turn around and treat the closely related term "employees employed in domestic service employment" more narrowly for purposes of applying the exemption under Section 213(a). Br. in Opp. 28. There is no good reason to think Congress had this kind of haphazard treatment in mind, and respondent's attempt to ground it in the Department's own regulations runs into the fact that the

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[3] Although respondent argues that Congress did not "intend" to exempt third-party employers, Br. in Opp. 21-28, the Second Circuit largely abandoned any reliance on congressional intent. *See* Pet. App. 5a ("[c]onsideration of congressional intent . . . does not lead to any definitive conclusion regarding the enforceability of § 552.109(a)").

Department itself interprets those regulations in an entirely different way. *See* Pet. App. 54a-63a.

We have previously argued that the Department's interpretation of its own regulations merits substantial deference. *See* Pet. 28-30; *Stinson v. United States*, 508 U.S. 36, 45 (1993). For her part, respondent claims that the Department has forfeited the right to deference by refusing to read certain words in the definition of "domestic service employment" in 29 C.F.R. § 552.3 ("private home . . . of the person by whom he or she is employed") as excluding employees of third-party employers. *See* Br. in Opp. 26. But the Department has explained in some detail that those words were simply not meant to address whether third-party employees are within the category of workers engaged in "domestic service employment," much less deliberately to say that they are not. *See* Pet. App. 55a-63a. By contrast, respondent has no explanation at all for the inexplicable consequence of her (and the Second Circuit's) interpretation of the same regulations: that the Department expressly extended the companionship services exemption to third-party employers in Section 552.109(a) even though it had just declared those same employers ineligible for it in Section 552.3. Given the choice between that farfetched interpretation and the Department's own more reasonable explanation, it would be preferable to adopt the latter even if no deference to agency expertise tilted the balance.

4. As a final point, respondent argues that Section 552.109(a) is procedurally invalid, saying that the Department should have sought another round of comments in 1975. Br. in Opp. 28-30. But the district court held that this argument was not properly raised, *see* Pet. App. 38a-39a n.3, and the Second Circuit did not rely on it. *See* Pet. App. 28a. Moreover, the argument is strikingly weak. Even if one can make a procedural challenge thirty years after final agency action—and even leaving aside the fact that the Department

has since engaged in several additional notice and comment rulemakings in order to decide whether to amend the regulation—it is readily apparent that the Department did not need to invite more comments in 1975. As the D.C. Circuit has stated, a central question in assessing the need for further comment is "whether a new round of notice and comment would provide the *first* opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (internal quotation marks omitted) (emphasis in original quotation). Here, it would not: all interested parties were given a full chance to address whether the exemption should apply to third-party employers (the question raised by the proposed rule). Once parties have received the initial opportunity to "comment meaningfully," *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (internal quotation marks omitted), "if the agency then alters its course in response to the comments it receives, little purpose would be served by a second round of comment." *Id.*[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] Urging further delay, Br. in Opp. 3, respondent suggests that other cases will be raising the same issue. But the prospect of more litigation is a reason for granting review, not postponing it. Amicus Home Care Council of New York City, Inc. has noted that, in addition to cases outside the Second Circuit, there are already more than 20 pending cases challenging Section 552.109(a) in the Southern and Eastern Districts of New York. Home Care Council Am. Br. 11 & n.2.

Respectfully submitted,

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